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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of U S WEST Communications, Inc., for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Dkt. No. 98-157

REPLY COMMENTS
OF THE
AD HOC TELECOMMUNICATIONS
USERS COMMITTEE

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The Ad Hoc Telecommunications Users Committee (the "Ad Hoc Committee" or the "Committee") submits these Reply Comments in response to the comments and oppositions filed with respect to the referenced Petition of U S WEST ("Petition").[1] For the reasons set forth below, the Committee has concluded that the Commission should deny the Petition.

The Committee's members, all major buyers of telecommunications services, would be among the first to benefit from competitive pricing in the local exchange and access service markets. Therefore, the Committee's recommendation that the Commission deny U S WEST's Petition would seem to be counter to, at least, the Committee's short-term interest in lower rates. The Ad Hoc Committee has concluded, however, that its long- term interest in sustainable, effectively competitive local

[1] Petition of U S West Communications, Inc. for Forbearance, in CC Docket No. 98-157, (filed August 24, 1998). ("U S West Petition" or "Petition").

exchange and access service markets would be best served by urging the Commission to deny the Petition.

The better approach is for the Commission to consider within CC Docket No. 96-262 whether dominant local exchange carriers ("LECs") should be granted pricing flexibility to respond to actual competition, and if so, under what circumstances.[2] In particular, the Commission should re-visit its earlier objections to LEC single-customer offerings that may be justified by the competitive necessity doctrine.[3] The Commission's concerns in earlier cases may be allayed in certain circumstances by adopting an approach that melds the competitive necessity doctrine with the prophylactic safeguards against unreasonable discrimination that contract tariffs can provide.

INTRODUCTION AND SUMMARY

U S WEST has asked the Commission to declare that it is non-dominant in the provision of high-capacity services[4] in the Phoenix, Arizona MSA.[5] Alleging that

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[2] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing and End User Common Line Charges,* CC Dkts. Nos. 96-262, 94-1. 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 , FCC 97-158 (1997) ("*Access Charge Reform Order*").

[3] *E.g., Southwestern Bell Telephone Company – Tariff F.C.C. No. 73,* Transmittal No. 2633, CC Dkt. No. 97-158, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311 (1997) ("*SBC*"), *recon. denied,* 13 FCC Rcd 6964 (1998) ("*SBC Reconsideration Order*") (prior and intermediate history omitted). In *SBC,* the Commission concluded that SBC's single-customer "Request for Proposal" ("RFP") tariff transmittal was so limited in its applicability that it was not available to similarly situated customers; therefore, the Commission found SBC's proposed transmittal to be unreasonably discriminatory under Section 202(a) of the Act, 47 U.S.C. § 202(a). For that reason, and because it found that SBC could use the tariff to prevent competitive entry, the Commission rejected SBC's argument that the competitive necessity doctrine justified the tariff. In addition, the Commission concluded that the RFP tariff would violate the rate averaging rules, 47 C.F.R. § 69.3(e)(7). *SBC,* 12 FCC Rcd at 19314, 19320; *SBC Reconsideration Order,* 13 FCC Rcd at 6965-66.

[4] As used herein and in the Petition, a "high-capacity service" is any dedicated service with a

substantial competition exists in the provision of high-capacity services in the Phoenix market, U S WEST has asked the Commission to forbear from applying dominant carrier regulation to its provision of such services in that market under Section 10 of the Communications Act of 1934, as amended (the "Act").[6] Specifically, U S WEST has requested the Commission to declare that U S WEST's high capacity services in Phoenix are:[7]

- subject to permissive detariffing, *i.e.*, permitted but not mandatory tariffing on one days' notice, with a presumption of lawfulness and without cost support;
- free from price cap and rate-of-return regulation;
- not subject to Section 69.3(e)(7) of the Commission's Rules,[8] which requires dominant carriers to charge averaged rates throughout their study areas; and
- free from any other rule that applies to U S WEST, but not to other providers of high-capacity services in the Phoenix MSA.

Because each of U S WEST's requests is predicated on its assertion that substantial competition exists in the Phoenix market for high-capacity services, if such competition does not in fact exist -- and it doesn't -- U S WEST's requests should be denied.

This is not to say, however, that a dominant LEC should never be granted some

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capacity of DS-1 or above, using wireline or wireless facilities, which can be used to transmit voice, data, or both, by end users, government, or other carriers. Petition at 11.

5 Petition at 9.

6 47 U.S.C. § 160.

7 Petition at 8-9, 35.

8 47 C.F.R. § 69.3(e)(7).

degree of pricing flexibility. As explained more fully below, the Commission has already recognized that, under the appropriate circumstances, the "competitive necessity doctrine" could justify volume discounts for generally available interstate special access services offered by dominant LECs offerings that are priced to respond to competition for such services.[9] The Commission's prior rejections of dominant LECs' single-customer competitive response offerings have turned largely on the findings that those offerings were not generally available to similarly situated customers and therefore were unreasonably discriminatory under Section 202(a) of the Act.[10] But the potential for unreasonable discrimination might be diminished while still allowing dominant LECs to compete for contested customers if the Commission requires those LECs to justify their single-customer competitive response offerings using the competitive necessity doctrine and, in addition, requires the LECs to tariff approved offerings as contract tariffs and make them generally available to any customer willing to agree to the volume and term requirements of the tariffed offerings.

Such an approach would be consistent with the Commission's reasoning when it concluded that AT&T could lawfully make individualized contract-based offerings to business customers, as long as AT&T tariffed those offerings and made them generally available to other similarly situated customers willing and able to meet the contract

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[9] *SBC, supra,* note 3, 12 FCC Rcd at 19315 & n. 11 (citing *Private Line Rate Structure and Volume Discount Practices Guidelines,* CC Dkt. No. 79-246, Report and Order, 97 F.C.C. 2d 923, 948 (1984) ("*Private Line Guidelines Order*").

[10] 47 U.S.C. § 202(a); *see supra,* note 3.

tariffs' terms.[11] The Commission explained that competition in the business interexchange services market was sufficient to limit AT&T's ability to use such individually negotiated offerings to unreasonably discriminate, even though AT&T was still classified as a dominant carrier in that market.[12]

Although the Commission has not yet found a dominant LEC's single-customer offering to be lawful under the competitive necessity doctrine,[13] emerging competition in certain LEC product and geographic markets warrants Commission exploration of how best to balance the public benefits that would come from allowing ILECs to compete fairly for business with the public's interest in ensuring that such ILEC competition does not produce unreasonable discrimination nor retard the development of effectively competitive local exchange and access service markets. The Commission's *Access Reform* rulemaking, CC Docket No. 96-262 – not piecemeal consideration of numerous petitions for waiver or forbearance -- is the appropriate avenue for addressing this difficult balancing problem. This problem is unavoidable as long as the ILECs hold market power and their markets are open to competition.

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11 *Competition in the Interstate Interexchange Marketplace,* CC Dkt. No. 90-132, Report and Order, 6 FCC Rcd 5880, 5902-03 (1991) ("*Interexchange Competition Order*").

12 *Id.* at 5903.

13 *SBC, supra,* note 3, 12 FCC Rcd at 19315; *SBC Reconsideration Order, supra,* note 3, 13 FCC Rcd at 6966 & n. 13.

DISCUSSION

I. THE COMMISSION SHOULD DENY U S WEST'S PETITION FOR FORBEARANCE.

A. U S WEST's Petition Fails To Satisfy Section 10's Requirements For Regulatory Forbearance.

As U S WEST has acknowledged,[14] under Section 10 of the Act,[15] the Commission must forbear from enforcing any regulation or provision of the Act only if:

- enforcement is not necessary to ensure that a carrier's rates or practices are just and reasonable and not unjustly and unreasonably discriminatory;
- enforcement is not necessary to protect consumers; *and*
- forbearance is consistent with the public interest.

In making its determination, the Commission is required to consider whether forbearance will promote competition.[16] U S WEST has argued that competition in the relevant product and geographic markets is sufficient to ensure that its rates and practices will be just and reasonable and not unjustly and unreasonably discriminatory; therefore, it claims that it has satisfied the first requirement for forbearance.[17] Moreover, U S WEST has asserted that the level of competition makes dominant carrier regulation of U S WEST's high-capacity services unnecessary to protect consumers,

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14 Petition at 2.

15 47 U.S.C. § 160(a).

16 *Id.*, § 160(b).

17 Petition at 35.

thus satisfying the second requirement for forbearance.[18] Finally, U S WEST alleges that the forbearance it has requested would increase competition in the relevant product and geographic markets, and hence be consistent with the public interest. U S WEST concludes[19] that its request satisfies the third requirement for forbearance and the "competitive effect" test of Section 10(b).[20]

Substantively, U S WEST's Petition must succeed or fail based on the level of competition that actually exists in the relevant product and geographic markets. Because the weight of evidence in the record refutes U S WEST's claims regarding the level of such competition, U S WEST has failed to meet the three-part test for forbearance under Section 10 and its Petition should be denied.

Although the Ad Hoc Committee does not have first-hand access to raw data regarding the level of competition in the provision of high-capacity services in the Phoenix, Arizona MSA, the submissions of several other parties in this proceeding make it abundantly clear that U S WEST does not face effective competition in the provision of such services in Phoenix. The experience of members of the Ad Hoc Committee is consistent with this conclusion.

The Oppositions of MCI, CompTel, Qwest, and GST Telecom[21] present

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[18] *Id.* at 38.

[19] *Id.* at 38-44.

[20] 47 U.S.C. § 160(b).

[21] Opposition of MCI Worldcom, Inc. in CC Dkt. No. 98-157 (filed October 7, 1998) ("MCI Opposition") at 9, 17-18, 20-21; Opposition of the Competitive Telecommunications Association in CC Dkt. No. 98-157 (filed October 7, 1998) ("CompTel Opposition") at 5-7; Opposition of Qwest Communications Corporation in CC Dkt. No. 98-157 (filed October 7, 1998) ("Qwest Opposition") at 3-5;

persuasive data and arguments that refute U S WEST's claim that it lacks market power in the provision of high-capacity services in the Phoenix market. Given the detailed data and analysis other parties have provided concerning the true level of competition U S WEST faces, it is unnecessary to reiterate those points in these Reply Comments. Rather, it is sufficient to note that the record is fully developed with regard to the issue of competition and that it unequivocally discredits U S WEST's allegations, which are at the heart of its request for forbearance.

Competition has not reached a level that would make dominant carrier regulation unnecessary to ensure the justness and reasonableness of U S WEST's rates and practices with respect to high-capacity services. Nor would current market conditions be adequate to protect consumers in the absence of dominant carrier regulation of such services. And because competition is presently insufficient to constrain anticompetitive conduct by U S WEST, forbearance may impair, rather than promote, competition, and ultimately disserve the public interest. For these reasons, U S WEST's Petition should be denied.

B. The Commission should take a comprehensive, rather than piecemeal, approach to pricing flexibility for dominant LECs.

Grant of U S WEST's Petition would not only be wrong as a substantive matter, it would be a procedural mistake as well. As MCI and Sprint have noted, a grant of U S WEST's Petition would invite a flood of "me too" petitions from other ILECs seeking

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Comments of GST Telecom Inc. in Opposition to Petition for Forbearance in CC Dkt. No. 98-157 (filed October 7, 1998) ("GST Telecom Opposition") at 10-18.

similar regulatory relief,[22] Ameritech's Comments confirm the fears of MCI and Sprint.[23] Proceeding on the basis of individual petitions would also waste Commission resources and could result in inconsistent rulings.[24]

The issues raised by U S WEST's Petition are, however, extremely important and should be addressed on an industry-wide scale. To the extent that consideration of such issues might result in generally applicable changes in the Commission's policies regarding ILEC pricing flexibility, consideration of these should occur in the *Access Reform* rulemaking, CC Docket No. 96-262.[26] In short, apart from whatever substantive merit the Commission may find in U S WEST's Petition, as a procedural matter, the Commission should deny the Petition and address the issues it raises in a rulemaking proceeding.

II. THE COMMISSION SHOULD OPEN A RULEMAKING PROCEEDING TO CONSIDER THE COMPETITIVE NECESSITY DOCTRINE AND A CONTRACT TARIFF APPROACH AS THE MEANS FOR ASSESSING AND GRANTING DOMINANT LEC REQUESTS FOR PRICING FLEXIBILITY.

Petitions, such as U S WEST's, for regulatory forbearance under Section 10 of

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[22] MCI Opposition at ii, 26-27; Opposition of Sprint Corporation in CC Dkt. No. 98-157 (filed October 7, 1998) ("Sprint Opposition") at 4.

[23] Comments of Ameritech in CC Dkt. No. 98-157 (filed October 7, 1998) at 2-3.

[24] Sprint Opposition at 4.

[25] Comments of GTE Service Corporation in CC Dkt. 98-157 (filed October 7, 1998) ("GTE Comments") at 6.

[26] The Commission is considering in CC Docket No. 96-262 the degree of pricing flexibility that it should grant local exchange carriers subject to the price caps rules. The Committee's comments on U S West's Petition are relevant to issues raised in CC Docket No. 96-262.

the Act are by no means the only method by which dominant LECs may seek pricing flexibility for their services. As noted above, the Commission has already recognized that the competitive necessity doctrine can justify volume discounts for certain LEC services which might otherwise be found unreasonably discriminatory under Section 202(a) of the Act.[27]

In the *SBC Reconsideration Order,*[28] however, the Commission stated that,

> at least until [it] revisit[s] these issues in the broader context of [a] rulemaking proceeding, [it] would not apply the competitive necessity doctrine to dominant local exchange carriers who are proposing customer-specific tariffs because such an application would thwart the public interest of promoting competition in the local exchange and exchange access markets.

Although U S WEST has failed to demonstrate a sufficient level of competition to justify the forbearance it has requested, the evidence it has presented at least indicates that conditions are becoming more competitive in discrete, niche markets. Thus, it now may be appropriate for the Commission to revisit the possibility of allowing dominant LECs to make single-customer offerings in response to competition under the competitive necessity doctrine, if such offerings are tariffed as contract tariffs and are generally available to similarly situated customers.

A. The Competitive Necessity Doctrine Provides One Mechanism For Determining Whether Competitive Conditions Justify Pricing Flexibility.

In the *Private Line Guidelines Order,*[29] the Commission established a three-part

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27 47 U.S.C. § 202(a); *see Private Line Guidelines Order, supra,* note 9, 97 F.C.C. 2d 923, 948.

28 *Supra,* note 3, 13 FCC Rcd at 6966.

test for determining whether the competitive necessity doctrine could justify volume discounts on generally available interstate special access services. Under that test, which has recently been reaffirmed in the *SBC* and *SBC Reconsideration* Orders,[30] a dominant LEC's generally available discounted competitive response offering will be lawful only if:

- equally or lower priced competitive alternatives are generally available to customers of the discounted offering;
- the discounted offering responds to competition without undue discrimination; and
- the discount contributes to reasonable rates and efficient services for all users.

The competitive necessity test articulated in the *Private Line Guidelines Order* first requires evidence of substitutes for the relevant LEC service, priced at truly competitive levels. Second, it requires the proposed LEC offering to be in response to competition and not to be unduly discriminatory. The latter requirement, and the requirement that the LEC's competitive offering "contribute to reasonable rates and efficient services for all users" diminish the dominant LECs' ability to misuse the competitive necessity doctrine to disguise predatory pricing or unlawful cross-subsidization of competitive services.

The Commission should consider whether current or anticipated competitive conditions could warrant justification of generally available single-customer competitive

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29 *Supra,* note 9, 97 F.C.C. 2d 923, 948.

30 *Supra,* note 3, 12 FCC Rcd 19315 & n. 11; 13 FCC Rcd at 6966.

response offerings by dominant LECs under a competitive necessity-based theory.

B. Adoption Of A Contract Tariff Process For Single-Customer Competitive Response Offerings Could Address The Commission's Historical Concerns About Unreasonable Discrimination, And Emerging Competition In Some LEC Markets May Diminish The Risk Of Anticompetitive LEC Conduct.

In the *SBC Reconsideration Order,* the Commission explained that its cases analyzing the competitive necessity doctrine did not bar application of the doctrine to the customer-specific offering SBC had proposed, but that it had refused to apply the doctrine to SBC's tariff because "the tariff potentially enabled [SBC] to prevent competitive entry."[31] Moreover, the Commission held that its precedent did not require it to apply the competitive necessity doctrine to tariffs, such as SBC's, that were not generally available to similarly situated customers.[32] Because it found that the rates in SBC's proposed competitive-response tariff were available only to "subsequent customer[s] [having] a network configuration nearly identical to that of the original customer" -- an unlikely scenario -- the Commission concluded that the tariff was effectively limited to the original customer and thus was unreasonably discriminatory under Section 202(a) of the Act.[33]

In reaching its first conclusion regarding the risk of anticompetitive conduct, the Commission considered substantial record evidence concerning the level of competition

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31 *Supra,* note 3, 13 FCC Rcd at 6967.

32 *Id.* at 6966.

33 *Id.* at 6965-66.

SBC faced in the relevant product and geographic markets. That evidence was insufficient to assuage the Commission's concerns regarding the potential for anticompetitive conduct by SBC. But as the Commission itself has recognized in the *Access Charge Reform* Order,[34] competition is increasing in certain LEC markets, and regulation of LECs' interstate access services should become streamlined in response to such competition.

The Commission's second principal concern regarding the lawfulness of single-customer offerings by dominant carriers -- namely, that they would be unreasonably discriminatory if not made generally available to similarly situated customers[35] -- is readily addressed. The Commission need only look to the *Interexchange Competition Order*[36] for precedent and guidance regarding the accommodation of Section 202(a)'s prohibition on unreasonable discrimination with single-customer, competitive response offerings by dominant carriers. In that Order, the Commission concluded that individualized offerings to customers in competitive markets were not *per se* unlawful under Section 202(a) as long as the terms of such offerings were both (1) made generally available to all other similarly situated customers willing and able to meet those terms; and (2) memorialized in contract-based tariffs filed with the Commission prior to their effective date.[37] The Commission's reasoning in reaching that conclusion

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[34] *Access Charge Reform Order* at ¶¶ 260 - 274.

[35] *SBC, supra,* note 3, 12 FCC Rcd at 19314-16; *AT&T Communications -- Tariff F.C.C. No. 15, Competitive Pricing Plan 22, Transmittal No. 3921,* 7 FCC Rcd 4636 (Com. Car. Bur. 1992).

[36] *Supra,* note 11, 6 FCC Rcd at 5902-03.

[37] *Id.* at 5903.

is firmly supported by judicial precedent.[38]

The second prong of the competitive necessity test requires that a competitive response offering not be unduly discriminatory. If a dominant LEC's single-customer offering meets both requirements for AT&T contract-based tariffs established in the *Interexchange Competition Order,* then the offering should be deemed to satisfy the competitive necessity test's prohibition on undue discrimination. Moreover, if an offering is tariffed and made generally available to similarly situated customers, the Commission's historical concerns about unreasonable discrimination should be answered.

C. The Commission Should Consider The Issues Raised By U S WEST's Petition In The *Access Charge Reform* Proceeding.

In the *Access Charge Reform* Order,[39] the Commission endorsed the use of a market-based approach to access reform, in which the Commission would "retain the protection afforded by price cap regulation, while relaxing particular restrictions on incumbent LEC pricing as competition emerges . . . ." The Commission acknowledged, however, that "[d]eregulation before competition has established itself . . . can expose consumers to the unfettered exercise of monopoly power and, in some cases, even stifle the development of competition, leaving a monopolistic environment that adversely

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[38] *MCI Telecommunications Corp. v. FCC,* 917 F.2d 30, 38 (D.C. Cir. 1990); *see Sea-Land Service, Inc. v. ICC,* 738 F.2d 1311, 1316-19 (D.C. Cir. 1984).

[39] *Access Charge Reform Order, supra,* note 2, at ¶ 260.

affects the interests of consumers."[40] It therefore announced that it would continue to rely on current mechanisms to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory.[41] The Commission indicated that it would consider the details of its market-based approach, in particular, the "specific competitive triggers and corresponding flexibility," in a later report and order.[42]

The Commission should use its recent reopening of the record in the *Access Charge Reform* proceeding to consider the circumstances in which the competitive necessity doctrine and use of contract-based tariffs might justify competitively priced, de-averaged service offerings by dominant LECs.[43]

III. PRICE CAPS TREATMENT OF SINGLE-CUSTOMER COMPETITIVE RESPONSE OFFERINGS.

In the event the Commission chooses to implement a solution that involves allowing U S WEST and/or other ILECs to file single-customer, competitive response tariffs, it must take care to ensure that these pricing plans do not adversely impact the prices made available to the vast majority of other ILEC high-capacity customers – those without competitive alternatives. It is therefore imperative that the high-capacity services priced on a competitive response basis be removed from the existing price caps baskets. The Commission should use Section 61.42(f) of its Rules, to remove

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40 *Id.* at ¶ 270.

41 *Id.* at ¶ 264.

42 *Id.* at ¶ 270.

43 MCI has suggested that the Commission consider the issue of pricing flexibility for dominant LECs in the *Access Charge Reform* proceeding. MCI Opposition at 27.

single-customer, competitive response tariffs from existing price caps baskets.[44] Once removed from the existing transport basket (and DS1 and/or DS3 sub-categories), two possible treatments exist.

- These services could be excluded from price caps altogether. Consistent with the requirement that services be offered on a non-discriminatory basis, however, a tariffing requirement should remain in place for the competitive response offerings despite their removal from the price caps plan.[45]
- An alternative, and perhaps more appropriate, solution would be to create an additional "competitive response basket" into which services in this category could be moved – a basket similar in many respects to the "interexchange services" basket that exists today.

This second approach seems more appropriate because it offers a modicum of protection in the event that the experiment in competition goes awry. Service offerings that are competitive at the time of tariffing may not remain so. While creation of a separate basket would not by itself offer an ILEC's competitors protection, it would offer some protection to its customers. Moving such services into a newly created basket

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[44] Section 61.42(f) of the Commission's Rules states;

> Each local exchange carrier subject to price cap regulation shall exclude from its price cap baskets such services or portions of such services as the Commission has designated or may hereafter designate by order.

[45] In the event such services are removed from price caps altogether and treated as "non-regulated," the Commission should establish a methodology for ensuring that the investment associated with the newly classified "non-regulated" services is properly identified, and such reclassification should be properly accounted for as an exogenous cost reduction pursuant to 47 C.F.R. § 61.45(d)(1)(v). Such exogenous adjustment should be identified as being directly attributable to the basket or sub-basket from which the service was removed.

would ensure that they remain within the Commission's control until such time as competition is more widespread and can be judged sustainable over the long haul. If such competition does not develop or existing competition withers, customers of ILEC contract tariff offerings should be protected against unreasonable rates, particularly rate increases imposed by the ILECs through their tariffs. Such customers should have the protection of the Commission's price caps rules as a mechanism to keep rates just and reasonable in the absence of competition. Precisely how those mechanisms would work for ILEC competitive necessity contract tariff offerings should be explored in CC Docket No. 96-262.

Although the present Part 61 Rules specifically contemplate the removal of "services" or "portions of services" from existing price caps baskets, they do not provide specific guidance as to how those "portions of services" should be accounted for during the removal process. Specific instructions exist for moving new services *into* price caps baskets.[46] Similar rules would need to be adopted to govern the "removal" of competitive response offerings. Development of such rules also should occur in CC Docket No. 96-262.

[46] *See, e.g.*, 47 C.F.R. §§ 61.42(g), 61.45(f), 61.46(b), 61.47(b), (c).

CONCLUSION

For the foregoing reasons, the Commission should deny U S WEST's Petition for Forbearance and consider in CC Docket No. 96-262 whether to grant dominant LECs pricing flexibility to respond to competition and, if so, under what circumstances.

Respectfully submitted,

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Certificate of Service

I, Suzanne Takata, hereby certify that true and correct copies of the preceding Reply Comments of the Ad Hoc Telecommunications Users Committee in CC Docket Number 98-157 were served this 28th day of October, 1998 via hand delivery to the following parties.

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